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Nos. 86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a civil rights organization which is national in membership. One of the League's central concerns is religious liberty. In pursuing this interest the League has often consulted with employees suffering religious discrimination, initiated litigation on behalf of these employees, and filed amicus curiae briefs with this Court urging expansive protection of religious freedom in employment. *See Ansonia*

Board of Education v. Philbrook, 55 U.S.L.W. 4019 (U.S. November 17, 1986); *Goldman v. Weinberger*, 106 S.Ct. 1310 (1986). Although the League is concerned about discrimination in employment, it is also concerned about the possible infringement upon the religious freedom of religious institutions which may accompany the application of discrimination laws to religiously oriented employers. For example, the League recently filed an amicus curiae brief with this Court arguing that application of a state employment discrimination statute to a religious oriented employer could cause religion clause problems. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986). Finally, the League is very concerned with the type of expansive judicial interpretion of the Establishment Clause which is found in the instant case. The League has filed amicus curiae briefs with this Court in the past urging against such broad construction of the Establishment Clause. *See Edwards v. Aguillard* (No. 85-1513); *Aguilar v. Felton*, 105 S.Ct. 3232 (1985). The League's brief in this matter implements the League's varied interests in this area by urging that the Establishment Clause does not prohibit Congress from simultaneously enacting legislation protecting against religious discrimination in employment and allowing religious organization employers freedom from the coercive reach of such legislation.

SUMMARY OF ARGUMENT

Federal judicial review of congressional legislation under the religion clauses presents unique problems when the legislation itself is designed to avoid religion clause difficulties. The district court's decision illustrates some of the problems which result when the tripartite Establishment Clause test established by this Court in *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), is applied to this type of legislation. In light of this Court's "unwillingness to be confined to any single test or criterion in this sensitive area," *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), it would be wise for this Court to adopt a test in this case which would provide appropriate deference

to Congress' constitutional interpretations made in the course of the exercise of its assigned constitutional duties, *see United States v. Nixon*, 418 U.S. 683, 703 (1974), and which would take into account Congress' desire to avoid constitutional problems. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979). Adopting such a test would avoid many of the problems which confronted the district court and would almost certainly result in a conclusion recognizing the constitutionality of the involved congressional legislation.

However, a proper application of the *Lemon* test's "primary effect" component would also result in a decision upholding the statute's constitutionality. The district court's "primary effect" construction was affected by four interrelated but relatively distinct difficulties: 1) the district court's failure to determine the legislation's religious effect by comparison to a case in which no governmental action occurred; 2) the district court's omission from its analysis of the religious advancement which results from religious discrimination statutes; 3) the district court's relatively unprecedented finding of governmental sponsorship of religion in a governmental determination to leave religious institutions free from specific types of coercive regulation; and 4) the district court's improper use of tests derived from judicial review of legislation under the religion clauses as a significant guide for determining the extent of congressional authority to legislate to avoid religion clause difficulties and the degree of deference a court should accord such congressional actions.

The district court approached this case by characterizing the involved statute as an exemption and special privilege for religious institutions. *See Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791, 812-826 (D. Utah 1984), *juris. postponed*, 55 U.S.L. W. 3315 (U.S. November 3, 1986) (86-179, 86-401). In analyzing the case in this fashion the district court created a strong presumption that the statute was unconstitutional. In so doing the district court proved the truth of this Court's observation that "[f] ocus exclusively on the religious component of any activity [will] inevitably

lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. The congressional action involved in this case provided religious institutions with no privilege beyond that which they would have enjoyed in the absence of regulation. The case appears analogous to cases in which this Court has held the Equal Protection Clause not to be violated by the repeal of civil rights legislation which a government was never required to enact.

As well as failing to compare the government action to non-regulation, the district court failed to balance the religious effect of the exemption upon religious institutions against the limits the exemption placed on protection of individual religious exercise in employment. A proper consideration of the legislation's effect on individual religious exercise, as well as its effect upon religious institutions, would reveal that any "advancement" of religion that can be held involved in government's failure to coercively regulate religious insitutions' discrimination in employment is balanced by Congress' failure to advance the individual religious beliefs of employees in these cases. Had the district court considered the overall effect of the legislation it would have been difficult for it to conclude that the involved exemption had the primary effect of advancing religion.

The problems in the district court's analysis were further compounded by its relatively unprecedented characterization of congressional refusal to subject religious institutions to coercive regulation as advancement of religion. This case does not resemble the transfer of financially tangible resources to religious institutions arguably involved in either governmental financial aid, tax deduction or tax exemption legislation. Because religious institutions remain in virtually the same position as if they had never been regulated, the case does not resemble cases in which desirable non-economic privileges have been improperly accorded religious institutions or believers. In addition, the district court's position that the exemption for religious institutions is improper because it facilitates the extension of economic influence by religious institutions lacks solid grounding in the Establish-

ment Clause. Finally, an exemption from religious discrimination legislation does not provide religious institution employers with an improper preference over other employers because the ability to engage in religious discrimination is not a universally valuable economic right, even if it is valuable to religious institutions for non-economic reasons. Thus, the congressional exemption from religious discrimination legislation may be analogized to Justice Stevens' characterizations of this Court's Free Exercise decisions in *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring): governmental action which does not provide religious believers with preferences which others might desire, but merely redresses unique difficulties the religious believer suffers in a particular situation because of his religious beliefs.

The district court's analysis also improperly utilized tests derived from judicial review of legislation for compliance with religion clause concerns over excessive entanglement and free exercise as guides for determining the vastly different questions of Congress' ability to design legislation to address these religion clause concerns and the degree of deference a court should accord such legislation. Use of these judicial tests presents problems for several reasons. Initially, these tests generally incorporate a high degree of deference to legislative judgements and, thus, have built into them the assumption that the legislative body can act in a fashion which would provide greater protection to the religion clause values at stake if it so desires. In the excessive entanglement area, use of the judicial test as a guide to Congress' ability to enact this legislation appears at odds with *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-507 (1979), in which this Court did not determine whether a congressional decision to refrain from coercively regulating a religiously oriented employer violated the Establishment Clause by doing more than what would be required of a court by judicial tests under the religion clause. In the free exercise area, use of judicial tests proves inappropriate because courts, in cases presenting only one religious institution's concerns, cannot address the vast

array of free exercise concerns which could motivate a legislative exemption. Such a test also proves an ineffective measure of legislative authority to regulate in this area because Congress' decision not to regulate reveals its determination that there does not exist a governmental interest in preventing discrimination sufficient to outweigh the effect upon free exercise values. Thus, a court in these cases will never be able to say with authority that a governmental interest overcomes free exercise concerns.

ARGUMENT

I. DIFFUCULTIES IN APPLYING THE *LEMON* TEST TO A CASE IN WHICH CONGRESS ACTS TO AVOID RELIGION CLAUSE PROBLEMS MAY CALL FOR UTILIZATION OF A DIFFERENT ESTABLISHMENT CLAUSE ANALYSIS SPECIFICALLY TAILORED TO THIS SITUATION.

The district court's decisions reveal the problems which result when a court attempts to apply the tripartite Establishment Clause test established by this Court in *Lemon v. Kurtzmann*, 403 U.S. 602 (1971), in a case in which Congress has refrained from regulating certain conduct to avoid possible religion clause difficulties. Indeed, the fact that the district court could find an Establishment Clause violation in a statutory framework designed with the specific intent of avoiding religion clause problems points toward the unsuitability of the *Lemon* test as a guide for determining conformity to the Establishment Clause in this matter.

This Court has never held the *Lemon* test to be the only suitable method for determining conformity to Establishment Clause requirments. Instead, the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). In light of this fact, the Court should apply a test in this case which would provide appropriate deference to Congress' constitutional interpretations made in

the course of the exercise of its assigned constitutional duties,[1] and which would take into account Congress' desire to avoid constitutional problems. *See NLRB v. Catholic Bishop,* 440 U.S. 490, 500 (1979). Certainly, any test applied in this case, even the *Lemon* test, should provide Congress with the flexibility it needs to address the complicated matter of regulating religious institutions' alleged religiously discriminatory employment decisions. Unfortunately, the district court paid lip service to congressional regulatory flexibility in this area, and then applied an Establishment Clause test which allowed Congress little more flexibility than a court would be permitted in invalidating congressional enactments on constitutional grounds. *See Amos v. Corporation of the Presiding Bishop,* 594 F. Supp. 791, 813, 814-826 (D. Utah 1984), *juris. postponed,* 55 U.S.L.W. 3315 (U.S. November 3, 1986) (86-179, 86-401). Should this Court apply a test which would allow Congress the freedom necessary to properly carry out its goal of regulating religious institutions' employment decisions in a manner which avoids religion clause problems, it would be almost certain that the statute involved in this case would be held constitutional. As will be seen, however, even under the *Lemon* test the statute should have been held constitutional.

II. THE DISTRICT COURT IMPROPERLY CONSTRUED THE "PRIMARY EFFECT" PRONG OF THE *LEMON* TEST IN ITS APPLICATION OF THAT TEST TO CONGRESS' DECISION NOT TO COVERCIVELY REGULATE RELIGIOUS DISCRIMINATION IN THE EMPLOYMENT DECISIONS OF RELIGIOUS INSTITUTIONS.

The district court specifically concluded that Congress enacted the statute at issue in this case to achieve the secular purpose of avoiding religion clause problems. *See* 594 F. Supp. at 805-812. Ironically, the court then concluded that Congress' very efforts to avoid religion clause difficulties vio-

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[1] *See United States v. Nixon,* 418 U.S. 683, 703 (1974).

lated the Establishment Clause since they had the "primary effect" of advancing religion. *See id.* at 812-826. The district court's disposition requires the conclusion either that Congress totally lacked the simple ability to design a statute to achieve its professed purposes or that the district court misapplied the *Lemon* test's "primary effect" component in reaching its decision. Amicus respectfully submits that the latter conclusion is correct.

The district court's "primary effect" analysis exhibits a number of shortcomings. While each of these defects is interrelated, it is possible to isolate at least four relatively distinct problems. These difficulties are 1) the district court's failure to determine the legislation's religious effect by comparison to a case in which no governmental action occurred; 2) the district court's omission from its analysis of the religious advancement which results from religious discrimination statutes; 3) the district court's relatively unprecedented finding of governmental sponsorship of religion in a governmental determination to leave religious institutions free from specific types of coercive regulation; and 4) the district court's improper use of tests derived from judicial review of legislation under the religion clauses as a significant guide for determining the extent of congressional authority to legislate to avoid religion clause difficulties and the degree of deference a court should accord such congressional actions. All of these problems contribute to the necessary conclusion that the district court erred when it determined that Congress' decision to exempt religious institutions from religious employment discrimination legislation had the primary effect of advancing religion.

A. The Primary Effect of Legislation Should be Detemined by Comparison to Cases in which No Governmental Action Has Occurred.

The district court approached this case by characterizing the involved statute as an exemption and special privilege for religious institutions. *See* 594 F. Supp. at 812-826. In analyzing the case in this fashion the district court created

a strong presumption that the statute was unconstitutional. In so doing the district court proved the truth of this Court's observation that "[f] ocus exclusively on the religious component of any activity [will] inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. If the district court had considered the statute in light of the situation which would exist if Congress had enacted no religious discrimination legislation, it would have been hard pressed to find any advancement of religion in this statute. The court certainly would have been unable to find the direct, immediate or substantial effect of advancing or inhibiting religion which it conceded was necessary for a finding of violation of the "primary effect" prong of the *Lemon* test. *See* 594 F. Supp. at 820.

When Congress chose not to regulate religiously discriminatory employment decisions of religious institutions, it simply left these institutions in the same position as if they had never been regulated. No privilege was provided these institutions beyond that which they would enjoy in the absence of governmental regulation. The district court's determination that the governmental decision not to interfere with religious institutions had the primary effect of advancing religion clearly appears to have resulted from the district court's excessive focus on the religious component of the decision's overall effect.

The district court seemed aware of the flaws in its analysis and responded with dictum from *King's Garden, Inc. v. FCC*, 498 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) to the effect that if Congress decides to regulate in an area in which it is not required to regulate, it may not choose to refrain from also regulating religious organizations. *See* 594 F.Supp. at 821. However, this reasoning would mandate the strange result that Congress could only avoid the significant religion clause problems involved in regulating religious discrimination in the employment decisions of religious institutions by refusing to provide any employees with protection from religious discrimination in employment. This sort of absurd result illustrates why "[i] n our modern, com-

plex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court." *Lynch*, 465 U.S. at 678.

Cases in an analogous areas support the proposition that government does not violate the Establishment Clause when it repeals religious discrimination protection it was never required to enact. This Court has clearly held that the Equal Protection Clause of the Constitution is not violated when a legislature repeals discrimination legislation it was not required to enact, if the repeal does not have a distorting effect upon governmental institutions (e.g., a state repealing local action) and does not specifically encourage discrimination. *Compare Crawford v. Board of Education*, 458 U.S. 527 (1982) (State may choose not to require mandatory bussing beyond federal constitutional standards, although it had previously required such bussing) *with Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (State electorate may not modify local school district's independent decisions on bussing because of distorting effect on political process). It would seem odd to hold that the Establishment Clause forbids a government from repealing a portion of its religious discrimination protection, when previous federal constitutional decisions have recognized that the important policy of encouraging legislation remedying discrimination must allow governments flexibility to enact discrimination legislation unrequired by the federal constitution without fear that they will violate the constitution if they choose to repeal such legislation. *See Crawford*, 458 U.S.at 539-540.

The district court's refusal to come to grips with the fact that the exemption placed religion in no better position than it would have been in the absence of governmental regulation clearly was a factor in its erroneous conclusion that the involved statute had the primary effect of advancing religion.

B. A Complete Primary Effect Analysis Requires Consideration of the Religious Advancement which Results from Statutes Forbidding Religious Discrimination in Employment.

Not only did the district court fail to compare religious institutions' position under the statutory exemption to the position they would have enjoyed in the absense of regulation, it also failed to consider the religious advancement which results from the enactment of employment discriminatin statutes. In this way the district court failed to heed this Court's warning in *Lynch* against excessive concentration upon particular religious effects of governmental actions and focussed only upon the one religious aspect of the statute which it deemed significant. The result was a further skewing of the district court's Establishment Clause analysis.

This Court has clearly indicated that religious discrimination statutes have the potential to advance religion in some fashion by aiding individual religious exercise. *See Estate of Thornton v. Caldor, Inc.* 105 S.Ct. 2914, 2917-2918 (1985). In fact, the religious discrimination statute at issue in that case was held to provide too much aid to a particular type of religious exercise and, thus, to have the primary effect of advancing religion. *Id.* While a concurring opinion in *Thornton* correctly stated that the federal religious discrimination statute at issue in this case has a secular primary effect because it provides a reasonable rather than an absolute accommodation of all rather than some religious beliefs,[2] it cannot be disputed that any religious discrimination statute provides some aid to religious exercise.

In light of this fact the district court's religion clause analysis should have focused on two sides of a religious effect equation instead of only one. On one side of the equation the analysis would recognize that Congress permissibly aided individual religious observance through religious discrimination statutes, but did not aid this individual religious ob-

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[2] *Id.* at 2919 (O'Connor, J., concurring).

servance in the few cases when the individual is employed by a religious institution which represents the religious concerns of its adherents. On the other side of the equation the analysis would recognize that any "advancement" of religion that can be held involved in the government's failure to coercively regulate religious institutions' religious discrimination in employment is balanced by Congress' failure to advance the individual religious beliefs of employees in these cases. Had the district court adequately considered this appropriate legislature balancing process, instead of focussing solely on the effect upon religious institutions, it would have been nearly impossible for it to simplistically conclude that the outcome of this legislative balancing process had the primary effect of advancing religion. However, as it now stands, the district court has virtually decreed that the Constitution inflexibly mandates the advancement of individual religious beliefs to the extent currently called for by Title VII in the case of a religious institution employer, while providing Congress only the latitude of the court's judicially created test in striking the balance between employee religious interests and those represented by religious institution employers. It is hard to believe that the flexible judicial approach to the Establishment Clause mandated by this Court's decisions would reach a result which so closely resembles judicial legislation. *See Lynch*, 465 U.S. at 678-679 ("In each case, the inquiry calls for line-drawing; no fixed, per se rule can be framed. The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'"(citation omitted)).

C. Congress' Refusal to Subject Religious Institutions to Coercive Regulation Cannot Properly be Characterized as Sponsorship of Religion.

Closely related to the district court's failure to measure the effect of the governmental action in this case upon religious institutions by comparison to the absence of governmental action is the district court's improper characterization

of a government decision not to regulate religious institutions as sponsorship of religion. This relatively unprecedented finding perhaps can be attributed to the fact that the district court focussed nearly exclusively on how the governmental action affected religious institutions in place of a balanced examination of how the statute affected both institutions and individual believers.

The only cases of which amicus is aware that find a failure of government to coercively regulate religion to have the primary effect of advancing religion are those which have considered either in holding or dictum the constitutional validity of the statute in this case. *See Amos, King's Garden.* The absence of precedent in other areas to support the district court's position can be easily explained by a simple examination of the vast difference between the governmental actions which this Court has found to have the primary effect of advancing religion and the governmental refusal to coercively regulate certain behavior of religious institutions found in this case.

Governmental action has been most clearly held to have the primary effect of advancing religion when tangible economic aid is furnished to religious institutions. *See, e.g., Grand Rapids School District v. Ball,* 105 S.Ct. 3216 (1985). Certainly, a governmental refusal to coercively regulate a religious insitution does not constitute the diversion of public funds contributed by all to a religious entity arguably involved in those cases. Likewise, some potential effect of advancing religion might be found in preferential tax exemptions or deductions for religious institutions, although the effect of such legislation often is not enough to violate the Establishment Clause. *See, e.g., Mueller v. Allen,* 463 U.S. 388 (1983); *Walz v. Tax Commission,* 397 U.S. 664 (1970). The clear economic benefit of a reduced tax burden for religion and a conversely increased tax burden for others involved in such a case can be at least arguably seen as a tangible economic benefit to religion and a subject of potential concern under the Establishment Clause. Such a specific economic benefit, which would be desired by all and which may

work an economic detriment on non-religious entities, vastly differs from a government refusal to coercively regulate religious discrimination which would not necessarily be desired by all and which has no real effect upon any other entity's regulatory burden.

This case also bears little resemblance to the non-economic forms of governmental action which previously have been found to have the primary effect of advancing religion. Because the statute merely leaves religious institutions in the same position which they would have enjoyed in the absence of regulation, it does not resemble the special privileges granted religious institutions by the "veto" accorded religious institutions in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), or the special privileges granted certain religious believers by the sabbatarian employment discrimination statute in *Estate of Thornton.* Indeed, the fact that religious institutions are simply in the same position as they would be in the absence of regulation means that they are granted even less of a governmental benefit than the individual believer receives under the almost certainly constitutional "reasonable accommodation" of religion provisions found elsewhere in Title VII. 42 U.S.C. 2000e(j) and 2000e2(a)(1). It is indeed difficult to ascertain how an advancement of religion of the type previously proscribed by this Court has resulted from the governmental action (or more properly inaction) found in this case.

In the face of the virtual absence of precedent or reasoning supportive of its findings that the governmental action involved in this case had the primary effect of advancing religion, the district court turned to language from *King's Garden* to the effect that this exemption constituted governmental sponsorship of religion since it would facilitate the extension of religious influence in the secular economy. *See* 594 F. Supp. at 825. A careful consideration of this position demonstrates its unsuitability as a basis for an Establishment Clause violation. A governmental decision not to regulate certain affairs of a religious entity does not constitute a benefit to the religious institution. The institution is merely

in the same position as it would have been if government had not entered this regulatory area. The values of religious liberty which underlie the religion clauses certainly do not call for a holding that government must regulate religious institutions in ways which would make it more difficult for them to participate in economic affairs. Yet, that is what the district court's concept of governmental sponsorship would seemingly require.

The district court also appeared to rely on the position that the statute provided religious institutions with a regulatory preference over non-religious groups. While such a position might make sense if the involved regulations provided the religious institution a tangible benefit which would also be desired by other entities, it is highly questionable whether the exemption from religious discrimination statutes is of value to other entities. Religious discrimination statutes are seemingly founded in part upon the premise that private and public economic interests are served by anti-discrimination statutes which ensure that personnel decisions will be made upon proper economic grounds. *See Jurisdictional Statement of the United States,* at 15 n.10. If this is true, an employer ordinarily will be more prosperous if its personnel decisions are made on the basis of relative pertinent qualifications rather than on discriminatory grounds. In addition, under Title VII an employer is only required to suffer *de minimis* costs in accommodating an employee's religious beliefs. *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977). Hence the ability to engage in religious discrimination, while possibly important to certain religious institution employers for non-economic reasons, is normally of little value to the non-religious institution employer. Accordingly, Congress, in the exercise of its legislative judgement, did not provide a preferential benefit to religious institutions by allowing religious institutions the exclusive ability to engage in behavior

which would be considered beneficial by other employers.[3] Congress' action is essentially analogous to Justice Stevens' characterizations of this Court's Free Exercise clause accommodation decisions: governmental action which does not provide religious believers with preferences which others might desire, but merely redresses unique difficulties the religious believer suffers in a particular situation because of his religious beliefs. *See United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

As can be seen, the district court's decision was further flawed because it found that a simple governmental refusal to coercively regulate a religious institution had the primary effect of advancing religion.

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[3] It is possible to conceive of some employers other than religious institutions who might appreciate the opportunity to make employment decisions on religious bases. For example, a fervent adherent to a particular religion might prefer to employ others who belong to his religion. However, Congress could properly exercise its legislative judgement in a fashion which would balance the various religious interests involved by preferring the free religious exercise of the individual employee to that of an individual employer but preferring the free religious exercise of a group of religious adherents (the religious institution employer) to that of an individual employee. Such a careful legislative judgement would not constitute an invalid preference of certain religious beliefs because institutional and individual religious beliefs are of many varied types and, more importantly, any regulatory scheme Congress could enact or refrain from enacting would inevitably prefer certain entities' religious preferences over others. For example, the regulation of institutions' employment discrimination desired by the district court would result in a preference for individual employee religious beliefs over those of both individual employers and religious institution employers.

D. Tests Derived from Judicial Review of Legislation under the Religion Clauses are Not Pertinent Guides for Determining the Extent of Congressional Authority to Legislate to Avoid Religion Clause Problems and the Appropriate Measure of Judicial Deference to Such Legislation.

The district court aggravated the difficulties resulting from its improper construction of the primary effect prong of the *Lemon* test by utilizing tests derived from judicial review of legislation for compliance with religion clause concerns over excessive entanglement and free exercise as guides for determining the vastly different questions of Congress' ability to design legislation to address these religion clause concerns and the degree of deference a court should accord such legislation.

As even the district court recognized, Congress' ability to accommodate religious belief is not co-extensive with the scope of noninterference with religion mandated by the Free Exercise Clause. *See* 594 F. Supp. at 813. However, the district court then proceeded to warn that "Congress must exercise a great deal of caution in drawing the boundaries of accommodation." *Id.* It followed this warning by applying judicial tests of entanglement and free exercise as significant guides in determining the proper scope of Congress' ability to regulate to avoid religion clause problems and the degree of deference it would accord such congressional actions. If the involved legislation was co-extensive with the judicial test the district court would probably have concluded that the action was a valid congressional attempt to implement the religion clauses. However, because the district court found the legislation to be more than what was required by judicial tests under the religion clauses, it subjected the legislation to fairly exacting Establishment Clause scrutiny. In utilizing this type of analysis the district court blurred the significant distinctions between judicial and legislature roles in upholding the religion clauses and improperly confined congressional regulatory flexibility in this important area.

Initially, it is important to recognize that tests utilized by federal courts in passing upon the constitutional validity of legislation are designed for a different purpose than is involved in the enactment of legislation. These tests will generally incorporate a high degree of deference to legislative judgements. For example, free exercise of religion can be adversely affected in situations which would not require a judicial exemption from generally applicable legislation. Thus in *Bowen v. Roy*, 106 S.Ct. 2147, 2158 n.19 (1986) (plurality opinion), it was indicated that Congress was free to legislate in ways which would protect free exercise of religion in a stronger fashion than a court would have been required to mandate. Similarly, a degree of entanglement may exist in particular governmental action which Congress could choose to avoid even though the entanglement would not be sufficiently excessive to require a court to invalidate the involved governmental action. What a court would be required to do, thus, has little relevance to the degree to which Congress may act to advance religion clause interests and avoid religion clause problems.

A closer examination of the district court's discussion of both entanglement and free exercise further illustrates the impropriety of its extensive use of judicial tests as a guide to determining the permissible scope of congressional action implementing the religion clauses and the extent of judicial deference to such action. Looking first at the entanglement area, the most instructive precedent is *NLRB v. Catholic Bishop*, 440 U.S. 490, 500-507 (1979). In that case this Court inferred a congressional intent not to regulate religious schools under the National Labor Relations Act because such regulation would have presented serious religion clause questions. One of the problems which could have resulted from such regulation was excessive entanglement of government in the affairs of an essentially religious institution. *See id.* at 501-504. In the instant case Congress has explicitly stated the desire not to regulate religious institutions which was only implicit in *Catholic Bishop*. The key point, however, is that the Court in *Catholic Bishop* nowhere determined

whether a court would have been constitutionally bound to exempt religious schools from regulation or even the more basic question of whether this legislative exemption violates the Establishment Clause. It is significant that the Court did not feel it necessary to address these issues because the dissenting opinion in *Catholic Bishop* contended that the involved legislative exemption would raise an Establishment Clause question. 440 U.S. at 518 n.11 (Brennan, J., dissenting). Accordingly, an important precedent exists for the proposition that a legislative body's determination to refrain from coercively regulating religious institutions will not be reviewed by a court under the Establishment Clause on the basis that the legislative body went beyond what would be required of a court by judicial tests under the religion clauses.

The district court's use of a judicial test as a guide for determining Congress' ability to accommodate free exercise concerns presents additional difficulties. Initially, the district court appeared to invalidate the generally applicable legislation in this case on the basis that the particular religious institution involved here apparently presented no significant free exercise claim for the religious discrimination it desired to engage in. *See* 594 F. Supp. at 817-820. This fact highlights a problem with utilization of a judicial test as a guide for determining legislative latitude in this area. A legislature must consider all parties covered by legislation, while a court must only consider the parties actually before it. Accordingly, a court will be unable to determine all the possible free exercise concerns which could be addressed by a statute such as that involved in this case. Thus, a judicial test under the free exercise clause is of little use as a guide for determining the vastly different question of legislative authority to address free exercise concerns.

Just as importantly, the governmental interest analysis under the judicial free exercise test will prove very difficult to apply as a guide in determining the scope of a legislature's ability to avoid possible free exercise clause problems. In a case such as this Congress has made a determination that there does not exist a governmental interest adequate to out-

weigh the free exercise interests which would be affected by governmental regulation. This means that free exercise will, by definition, not be overridden by a countervailing governmental interest in a case in which Congress has chosen not to regulate. In its analysis the district court emphasized that Congress' interests in eliminating religious discrimination were very strong and would have been sufficient under the judicial test to override any free exercise interests of religious institutions. *See* 594 F. Supp. at 819-820. However, if Congress has chosen not to regulate religious institutions, has it not by its own action determined that it does not have an interest in eliminating religious discrimination which would outweigh the involved free exercise interests?

This brief discussion illustrates some of the problems which result from the district court's utilization of judicial tests as a guide for determining Congress' ability to act to avoid religion clause difficulties, and judicial deference to such actions. Amicus urges this Court to adopt an analysis which will more properly recognize the unique needs of Congress for flexibility in acting legislatively to avoid religion clause difficulties.

CONCLUSION

In light of the problems with the district court's analysis highlighted above, the decision of the district court should be reversed.

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